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No. 90-48

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

PHILLIP SEELIG, as President of the Correction Officers Benevolent Association of the City of New York, Inc., and THE CORRECTION OFFICERS BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Petitioners,

-against-

RICHARD J. KOEHLER, as Correction Commissioner of the City of New York, THE DEPARTMENT OF CORRECTION OF THE CITY OF NEW YORK, and THE CITY OF NEW YORK,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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QUESTION PRESENTED

Does the New York City Correction Commissioner's plan to administer drug tests on a periodic basis to correction officers comport with the Fourth Amendment, where (1) there is a compelling justification for such testing because of such factors as the nature of the duties of correction officers, the intolerable risks that drug abuse on their part poses, correction officers' regular exposure to drug addicts and drug users, and the proven insufficiency of lesser measures in abating a palpable drug use problem among correction officers; (2) where correction officers enjoy extremely limited expectations of privacy with regard to security-related employer intrusions; and (3) where the plan is based upon detailed regulations that prevent unbridled discretion and preserve privacy to the maximum extent feasible?

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New York State Const., art. 1, sec. 12 15-16,23

CITATION

The decision of the New York State Court of Appeals is reported officially at 76 NY2d 87 and unofficially at 556 NYS2d 832 and 556 NE2d 125.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

STATEMENT OF THE CASE

(1)

The job of a New York City correction officer is especially delicate and demanding. Working largely in confined environments with violence-prone anti-social inmates who vastly outnumber them, correction officers

are responsible for insuring that prisoners strictly conform to prison regimentation and requirements; for protecting the safety and security of inmates, prison personnel, visitors, and prison facilities; and, in general, for insuring that sentences of imprisonment properly serve their rehabilitative, deterrent, incapacitative, and punitive purposes (133, 148).[1] Their work mandates that they perform at optimal mental and physical levels at all times (133-34). Thus, for example, correction officers must have the mental acuity and soundness of judgment to tactfully coax recalcitrant inmates into obeying regulations, to quickly perceive and prudently defuse explosive situations, and to withstand without overreaction the torrent of insults and

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[1] Numerical references in parentheses are to pages of the record on appeal before the New York State Court of Appeals, unless otherwise noted or apparent.

provocation commonly hurled their way by inmates (133-34). Likewise, uncompromised physical status is imperative to enable a correction officer, for example, to properly utilize a firearm or other weapon when necessary without endangering innocent parties, to physically intervene in order to break up frequent brawls among inmates, and to exercise necessary vigilance when manning a tower guard post or when searching visitors (74-75). The position of correction officer also demands questionless integrity, given the endless opportunities for corruption with which inmates and their criminal cohorts tempt correction officers and given the incalculable harm that can result from corruption and blackmail (75-77).

Indicative of the perilousness of the environments in which they operate and at the same time compounding the formidability of their tasks is the fact that the Correction Department has judged it necessary to

decree that correction officers not carry their weapons while performing ordinary patrol and supervisory duties because of the likelihood that inmates would overpower the officers and seize the weapons (133). All correction officers, however, are trained in the use of firearms and routinely carry guns when performing perimeter guard duty, when transporting prisoners, when guarding hospitalized prisoners, when searching for escaped prisoners, and at other appropriate times. In addition, even when performing ordinary patrol duties, all have access to revolvers, shotguns, and other weapons for use in quelling major disturbances and when otherwise essential.

Because the usage of illegal drugs by correction officers impairs vital mental and physical abilities and because such usage compromises integrity and paves the way for corruption and blackmail, the Correction Department has long been intent upon

insuring that correction officers do not engage in such misconduct. Heightening the Department's concern is the fact that the overwhelming majority of inmates with whom correction officers deal on a daily basis are either drug addicts or drug users. As a result, correction officers are frequently offered drugs as bribes by inmates and their cohorts and must be ever alert to the interdiction of drugs.[2] An additional result is that drug-using correction officers have a ready and highly profitable market at hand for the peddling of drugs -- a market the exploitation of which leads ineluctably to the frustration of drug rehabilitation efforts among inmates, the facilitation of bizarre drug-induced behavior on the part of

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[2] It is noteworthy that, during 1988, a total of 43 prison visitors were arrested on drug-related charges. In 1989, the figure increased to 74. Moreover, on the average, 15 inmates per month are caught with illegal drugs.

inmates, and the promotion of rivalry, combativeness, and violence among inmates who crave these commodities. Yet another result is that the chances are excellent that some inmates will have ties to the same drug network through which a drug-using correction officer receives his supply, will accordingly learn of the officer's usage, and will put the information to good advantage.

Because of this concern over drug usage by correction officers, the Department has long taken measures to discourage drug use among its members and to weed out abusers. Among the measures employed have been intensive educational efforts. Indeed, all applicants for the position of correction officer, all probationary correction officers, and all tenured correction officers are repeatedly warned about the dangers associated with drug usage and about the Department's absolute prohibition of such usage (139-40).

In addition to educational efforts, the Department has employed urinalysis drug testing. In supplementation of the Department's long-standing reasonable-suspicion drug-testing program, the Department has adopted several across-the-board drug-testing programs. To begin with, all applicants are tested for drugs (147). Further, all correction officers are now subjected to four suspicionless drug tests during their 18-month probationary periods. To guard to the maximum extent possible against adulteration of samples or other methods of cheating (tactics to which drug-abusing correction officers have resorted to avoid detection), the Department assigns a monitor to observe the collection of the urine sample in all reasonable-suspicion testing, in applicant testing, and in all four testings of probationers.

The Department has concluded that random drug-testing is imperative with

regard to tenured correction officers. Underlying this conclusion are not mere abstract beliefs that reasonable-suspicion testing, educational efforts, and other conservative measures have proven insufficient to meet the Department's needs but alarming statistical evidence of a drug problem in the Department unabated by such measures. Thus, in the 32-month period between January 1, 1985 and August 31, 1987, drug-related disciplinary charges were brought against a total of 149 tenured correction officers (136). This represents a rate of over 1.1% per year of the tenured correction officer force. Similarly, in the calendar year 1988, a total of 88 tenured correction officers were terminated or resigned as a result of drug-related charges -- a figure that translates into over 1.2% of the tenured correction officer force at the time.

These percentages are all the more worrisome when one realizes that they represent not the total number of drug offenders on the tenured force but merely those against whom the Department has been able to amass sufficient evidence to bring charges in the absence of any across-the-board drug-testing program for tenured officers. The Department believes that there are many more drug offenders on the force who have avoided detection (71).

Other evidence supports the Department's fears. For example, between January 1, 1986 and August 31, 1987, a total of 2,411 probationary officers were tested at the Academy (137). All were given approximately one week's advance notification of their testing date, allowing even frequent drug users to avoid detection simply by abstaining from drug usage for that period. Nevertheless, an astounding 2.9% tested positive (137). Similarly, the past several

years have witnessed a vast increase in the quantity of drugs successfully smuggled to inmates -- an increase that, in the Department's view, can be explained only by the participation of correction officers (134).

(2)

Before effecting its plan for the random drug-testing of tenured correction officers, the Department, on November 17, 1987, issued a directive containing detailed regulations concerning the working of the program (53-64). The directive discusses, inter alia, the scope and need for the program, the selection and testing procedures, and the treatment of test results (53-64).

With regard to scope, the directive notes that it is applicable to all uniformed members of the Department including the Chief of Operations and the Commissioner (53). Similarly, it notes that the purpose is to deter and detect drug abuse for internal

Departmental reasons (54) -- and not to facilitate criminal prosecution (138). With regard to need, the directive states: "In spite of an aggressive drug prevention educational program and testing procedures, including an aggressive reasonable suspicion testing program, the Department has documented a serious drug abuse problem among a significant number of its members" (54).

As to the selection procedure, the directive notes that it is to be wholly neutral and based on social security numbers (55). Specifically, a computer will be programmed to randomly select for testing fifty members every two weeks (55). Following selection, a member will be so notified on the assigned testing date (56). A supervising officer will escort the member to the Health Management Division, where testing is conducted (56-57).

With regard to testing procedures, the directive is modelled after the procedures

adopted by the U.S. Department of Health and Human Resources for the Federal Government's drug-testing program -- procedures that were upheld by this Court in National Treasury Employees Union v. Von Raab, 109 SCt 1384 (1989). The directive enumerates a series of steps designed both to protect personal privacy and assure testing integrity. Following a member's arrival at the Health Management Division, identification is carefully checked (57) and the member is asked to provide a listing of medications and foods recently ingested (60). A member is afforded the right to consult in person or by phone with an attorney or a union representative before deciding whether to submit to testing and is also afforded the right to have that attorney or representative witness the testing procedure (61).

Specimens are provided in a private closed stall without observation by anyone else (57). To thwart adulteration, however,

a Health Management Division monitor of the same sex is assigned to remain outside the stall, to receive the specimen from the tested individual, and to inspect the specimen for signs of irregularity or contamination (57-59). In addition, the toilet water in the stall is tinted blue to deter its use to dilute a specimen (58).

Significantly, this sample-taking procedure provides for more individual privacy than does the procedure to which correction officers have become accustomed in their pre-employment testing and their four probationary testings. As noted previously, those testing programs involve the provision of specimens under the direct visual observation of a monitor in order to guard to the maximum extent possible against cheating. The Department has adopted a more privacy-sensitive procedure here in an excess of caution because it views the establishment of a random-testing program

for tenured correction officers as imperative and wishes to minimize the possibility of constitutional invalidation.

Once the monitor has received the specimen and judged it legitimate, he tightly caps it, seals it with evidence tape, and labels it in the presence of the tested individual, who initials both the label and accompanying forms (59). The Health Management Division thereafter follows careful procedures to maintain an unbroken chain of custody at all times (59). Testing for drugs is thereafter performed at an accredited laboratory by means of the thin layer chromatography test and the enzyme multiplied immunoassay technique (60). In the event of a positive finding, a confirmation test by means of gas chromatography/mass spectrometry, a virtually infallible technique, is performed (60). The individual tested is thereafter advised of the results (62). If the results

are negative, notations are kept in the Legal Division but no record is maintained in the individual's personnel file (63). If the results are positive, the Legal Division is advised and disciplinary charges may ensue (63). Specimens containing drugs are maintained at the laboratory for six months, and the correction officer involved is afforded the right to have the specimen retested at an accredited laboratory of his choosing (61). Tenured officers found guilty after an administrative hearing face penalties that include dismissal (54).

(3)

On or about November 30, 1987, petitioners -- the labor union representing New York City correction officers and the union's president -- commenced the instant action to invalidate the Commissioner's directive (12-39). Relying upon both the Fourth Amendment and Article 1, Section 12, of the New York State Constitution, they

argued that drug-testing constitutes an unconstitutional search and seizure when it is not based upon individualized suspicion of drug abuse (17-25). They further argued -- without supplying any expert opinions or other supportive evidence -- that random testing is unnecessary, since the Department's legitimate interests in deterring and detecting drug abusers can be adequately satisfied through reasonable-suspicion testing (12-39).

In their answer, respondents alleged that the challenged program is in all respects constitutional (41-51). Respondents cited, inter alia, the limited expectations of privacy enjoyed by correction officers, the planned program's reliance upon procedures that minimize intrusion upon privacy, the compelling government interests in deterring and detecting drug abuse, the evidence of an incipient drug problem within the Department that lesser measures had been

unsuccessful in abating, and expert scientific opinion that reasonable-suspicion testing and other measures short of periodic testing are incapable of meeting the Department's needs (41-50). In support of their answer, respondents submitted an affidavit by Thomas Murray, the Correction Department's Chief of Operations, elaborating on the compelling justification and a second affidavit by Dr. Robert L. DuPont, a nationally-recognized medical expert on drug-testing, discussing the pernicious effects of drug abuse, the particular dangers posed by drug abuse on the part of correction officers, the legitimacy of the Department's apprehension concerning a worrisome drug problem in its midst, and why measures short of random testing are insufficient to meet the Department's needs (68-93).

By judgment entered on October 20, 1988, the New York State Supreme Court granted the petition and enjoined implementation of the directive. 140 Misc2d 783 (Sup. Ct., N.Y. Co., 1988). By order entered on October 12, 1989, the Appellate Division-First Department, by a vote of 3-to-2, reversed and upheld the directive. 151 AD2d 53 (1st Dept., 1989). By order entered on May 8, 1990, the New York State Court of Appeals, by a vote of 4-to-3, affirmed. 76 NY2d 87 (1990).

In upholding the program, the Court of Appeals carefully followed and repeatedly cited this Court's opinions in National Treasury Employees Union v. Von Raab, 109 SCt 1384 (1989), and Skinner v. Railway Labor Executives' Ass'n, 109 SCt 1402 (1989). The Court of Appeals based its affirmance on its conclusions that correction officers enjoy vastly diminished expectations

of privacy with respect to security-related employer intrusions upon privacy, that the Department had demonstrated a compelling interest in the deterrence and detection of drug use among correction officers, that this compelling Departmental interest outweighed the intrusion engendered by drug-testing upon those already diminished expectations, and that promulgated regulations prevented unbridled administrative discretion and preserved privacy to the maximum extent feasible. 76 NY2d at 89-90.

With regard to privacy expectations, the Court of Appeals noted that not all governmental employees enjoy equal privacy expectations and that such factors as voluntary pursuit of a position one knows to be pervasively regulated for reasons of safety and acceptance of severe intrusions upon privacy serve to markedly diminish expectations. Id. at 91. The Court noted that it is widely recognized that "correction

officers, because of the confined environment in which they work, the strict security measures governing their conduct, and the other distinctive features of their employment, have diminished expectations of privacy with regard to security-related employer intrusions." Id. at 91-92. The Court cited as well the many intrusions upon privacy long accepted by correction officers, including searches of cars and packages brought into jail facilities, regular searches of lockers, and searches of a correction officer's person at any time -- by force if necessary. Id. at 92-93. In addition, the Court cited the fact that correction officers undergo five suspicionless drug tests before reaching tenure. Id. at 92.

As to the governmental interest served, the Court of Appeals cited a number of factors rendering this interest overriding. The Court noted that the prison environments in which correction officers

work are fraught with serious security risks, requiring that correction officers operate without impairment of physical or mental abilities and with unblemished integrity. Id. at 93. Compounding the risks posed by drug abuse on the part of correction officers, the Court stated, is the composition of the New York City prison population -- a population 50% of whom are drug addicts and 90% of whom are at least drug users. Id. at 94. As a result, correction officers "represent a critical barrier between inmates and suppliers on the outside." Id. The Court additionally observed the existence of empirical evidence that measures short of random testing had been unsuccessful in deterring drug abuse. Id. The Court cited proof in the record that drug-related disciplinary charges had been brought against 149 tenured correction officers in a 32-month period and that fully 2.9% of probationary officers had tested

positive for drugs despite advance notification of testing. Id. at 94.

Finally, the Court of Appeals found the procedural safeguards to be wholly adequate, noting that they closely resemble those upheld by this Court in National Treasury Employees Union v. Von Raab, supra. Id. at 95-96. The Court of Appeals observed that selection is performed at random by a computer; state-of-the-art testing techniques are employed; samples are obtained without observation; employees who test positive may insist upon re-testing at another laboratory; and a hearing takes place before any discipline is imposed. Id. at 95-96.

The dissenting Court of Appeals judges viewed the challenged program as unconstitutional. Id. at 96-101. They did not take issue with the proposition that, in light of decisions of this Court and other Federal courts, the program passes constitutional muster under the Fourth

Amendment. Id. However, apparently invoking Article 1, Section 12, of the New York State Constitution, the dissenters judged the program unconstitutional because, in their view, it extended beyond the limitations on random testing previously set forth by the Court of Appeals in a case entitled Caruso v. Ward, 72 NY2d 432 (1988). The dissenters argued that random testing was upheld in Caruso because only a small elite unit of police officers was involved, that unit specialized in drug crimes and was consequently frequently exposed to drugs and to large sums of money, and that unit could not be subjected to careful scrutiny in the course of their duties. Id. at 96-101. The dissenters found the instant program less justifiable, reasoning that correction officers do not always carry guns while on duty, are less frequently exposed to drugs and bribes, and can be more carefully scrutinized. Id.

Following decision of the case by the Court of Appeals, petitioners requested that that Court grant them a stay pending a planned petition to this Court for certiorari. That application was denied on May 25, 1990. Petitioners thereafter requested a stay from this Court, which likewise denied the application on June 18, 1990. 110 SCt 3209 (1990).

REASONS FOR DENYING THE WRIT

CERTIORARI SHOULD BE DENIED, SINCE THE DECISION OF THE NEW YORK STATE COURT OF APPEALS IS IN COMPLETE HARMONY WITH THE TEACHINGS OF THIS COURT IN THE DRUG-TESTING FIELD AND WITH THE MUTUALLY CONSISTENT DECISIONS OF THE CIRCUIT COURTS OF APPEALS IN THAT FIELD. IN ADDITION, TREATMENT OF THE INSTANT CASE BY THIS COURT WOULD DO LITTLE TO ADVANCE THE STATE OF FEDERAL CONSTTTUTIONAL LAW.

There is no persuasive reason for the granting of certiorari in this case. In rendering the decision that it did, the New

York State Court of Appeals hewed carefully to the teachings of this Court in National Treasury Employees Union v. Von Raab, 109 SCt 1384 (1989), and Skinner v. Railway Labor Executives' Ass'n, 109 SCt 1402 (1989). The decision of the Court of Appeals is likewise in accord with the holdings in this area of law of numerous Federal Circuit Courts of Appeals, which themselves are entirely consistent with one another. In short, it is now well established across the nation that the Federal Constitution permits random drug-testing of governmental employees where the testing is limited to a group of employees who hold positions that carry a severely diminished expectation of privacy with regard to such measures and as to which government has an exceptional interest in deterring and detecting drug abuse and where testing is conducted under regulations that reasonably limit discretion and protect privacy. It is

for this reason, no doubt, that this Court has several times denied certiorari in other cases presenting like issues. While the state of Federal constitutional law might well be advanced by the granting of certiorari in a random drug-testing case which involves a category of employees whose satisfaction of the above-stated criteria is questionable and which hence presents this Court with an opportunity to define the limits of random testing, little good would be served by the granting of certiorari in a case such as this, in which, regardless of where one reasonably draws the line, the challenged program unquestionably falls on the side of constitutionality.

The reasoning of the State Court of Appeal herein squarely comports with that employed by this Court in upholding drug-testing programs in National Treasury Employees Union v. Von Raab, supra, and

Skinner v. Railway Labor Executives' Ass'n, supra.

At issue in Von Raab was the constitutionality of the United States Customs Service's program of administering drug tests, without any reasonable suspicion predicate, to employees seeking promotion or transfer to positions that involve either interdiction of drugs, carrying of firearms, or access to classified information. 109 SCt at 1387-88. The program, aimed at both deterrence and detection, was not based upon any palpable drug problem within the agency, and, indeed, administered drug tests yielded positive results in only about 0.1 of 1% of cases. Id. at 1400 (Scalia, J., dissenting).

In analyzing the case, this Court noted that where a Fourth Amendment search serves special needs beyond the normal need for law enforcement, as is the case with regard to employee drug-testing,

individualized suspicion may not be a constitutionally necessary predicate where governmental interests outweigh intrusiveness upon reasonable expectations of privacy. Id. at 1390. The Court further noted that an individualized suspicion predicate may be more readily deemed constitutionally unnecessary with regard to searches aimed at both preventing and discovering harmful conditions that frequently do not generate articulable grounds for search -- a category into which the Court placed drug abuse. Id. at 1392, 1395. The Court found that, as to all three classes of employees covered by the program, the governmental interests at stake were compelling. Id. at 1393, 1396. With regard to drug interdiction personnel, the Court cited their exposure to the criminal element, to bribes, to threats, and to drugs. Id. at 1393. With regard to firearms-carrying personnel, the Court cited

the grave dangers posed by the possible misuse of deadly force and the Fourth Amendment values furthered by checking such misuse. Id. With regard to those with access to sensitive information, the Court cited the evils resulting from possible compromise of such information. Id. at 1396. The Court additionally found that the employee privacy interests implicated by the program were, under the circumstances, insubstantial. Id. at 1393-94, 1397. Relying upon the decision of the New York State Court of Appeals in Caruso v. Ward, this Court cited the employees' voluntary pursuit of positions that they know to require extraordinary assurances of trustworthiness and probity. Id. at 1394. In addition, the Court cited the unobserved nature of the testing program and other characteristics that both assure reliability and minimize embarrassment. Id. at 1394 n.2. The Court expressly rejected the

argument that the absence of proof of a substantial drug problem within the agency should disallow dispensation with individual suspicion, citing the difficulty of detecting drug use through mere observation and the further reason that "[w]here, as here, the possible harm against which the Government seeks to guard is substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the Government's goal." Id. at 1395, 1395 n.3. In light of all of these factors, the Court fully upheld the program, with the exception of a remand for consideration of whether the program's definition of the sensitive information access category, which apparently covered such employees as accountants and baggage clerks, was overbroad. Id. at 1397.

In the second case, Skinner, this Court treated the constitutionality of post-accident drug-testing of railroad workers in the

absence of any individualized suspicion of drug abuse. As in Von Raab, the Court stated that "[i]n limited circumstances, where the privacy interests implicated by the search are minimal and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." 109 SCt at 1417. Again, as in Von Raab, the Court found that the testing intruded insubstantially upon the workers' expectations of privacy, because of the limited nature of those expectations as a result of their voluntary selection of positions that they know to be pervasively regulated for reasons of safety and because of the lack of observation and other features of the testing program that minimize intrusiveness. Id. at 1418-19. The Court also found that the governmental interests at stake were substantial. Id. at 1419. The

Court cited the grievous harm that an impaired employee can cause and the difficulty of detecting drug abuse through observation, noting that such employees "can cause great human loss before any signs of impairment become noticeable to supervisors or others." Id. The Court further noted that not only was the interest in detecting drug abuse and identifying the causes of accidents compelling, but the interest in deterring drug abuse was likewise compelling and effectively furthered by the program. Id. at 1419-20. The Court cited the fact that workers could not predict in advance when an accident would occur and hence when they would be required to undergo drug-testing as a major factor validly promoting the deterrence objective. Id. The Court reasoned:

> The railroad industry's experience ... persuasively shows, and common sense confirms, that the customary dismissal sanction that threatens employees who use drugs ... while on duty cannot serve as

> an effective deterrent unless violators know that they are likely to be discovered. By ensuring that employees in safety-sensitive positions know they will be tested upon the occurrence of a triggering event, the timing of which no employee can predict with certainty, the regulations increase the deterrent effect of the administrative penalties associated with the prohibited conduct, concomitantly increasing the likelihood that employees will forgo using drugs ... while subject to being called for duty.

Id. In light of the balance of interests at stake, the Court upheld the program. Id. at 1422.

These two decisions are highly supportive of the constitutionality of the program challenged in the case at bar. To begin with, they establish that individualized suspicion of drug abuse is not constitutionally necessary to permit the drug-testing of those employees working for or regulated by government (1) whose privacy expectations are vastly diminished because of their voluntary choice of highly sensitive positions involving great potential for harm and their

acceptance of pervasive regulation and (2) as to whom government has a compelling interest in conducting drug-testing without reasonable suspicion. Secondly, they establish that among the classes of employees who fall into this category are those who are responsible for interdiction of drugs, who are capable of inflicting grievous harm because they possess firearms, who have access to classified information, or who are responsible for the operation of trains. Thirdly, Von Raab establishes that proof of a pervasive drug problem within the particular workforce is not an essential predicate for such categorization where the potential harm against which government seeks to safeguard is substantial. Fourthly, the decisions establish that procedures like the ones adopted here are eminently constitutional.

The decision of the State Court of Appeals in this case is wholly consistent with Von Raab and Skinner. As in those cases,

the Court of Appeals engaged in a careful assessment of expectations of privacy and governmental interests and balanced the two. Furthermore, there can be no question that the Court of Appeals correctly gauged this Court's view of where the balance in the case at bar tips. Like the four classes of employees involved in Von Raab and Skinner, correction officers have voluntarily chosen occupations that they know to be pervasively regulated and to demand the utmost assurances of integrity and fitness. Like those classes, correction officers accept a host of intrusions upon privacy. Indeed, if anything, correction officers surrender far more of their expectations of privacy than members of those classes by virtue, inter alia, of their working in a locked-in environment and their inurement to five observed drug tests before reaching tenure. Furthermore, the governmental interests at stake in the deterrence and detection of drug

abuse among correction officers are surely at least as strong as those at stake with regard to the four classes. Indeed, in a very real sense, correction officers may be viewed as an amalgam of all four classes. Thus, they do not only have access to narcotics and perform drug interdiction functions. They do not only use firearms. They do not only have access to sensitive information about persons and crimes that, if divulged, could wreak havoc. They do not only carry the potential of causing or permitting deaths or injuries to large numbers of people through momentary oversight or indiscretion. Rather, they have all of these characteristics. What is more, in contrast at least with Von Raab, there is here supporting evidence of a perturbing drug problem.

Although neither Von Raab nor Skinner dealt expressly with periodic testing, there are strong indicia in the opinions that such testing is equally constitutional for the

classes involved as the programs precisely considered. Telling evidence is the reliance placed in Skinner upon the deterrence resulting from the fact that "employees in safety sensitive positions know they will be tested upon the occurrence of a triggering event, the timing of which no employee can predict with certainty." 109 SCt at 1420 (emphasis added). In so reasoning, this Court in effect conceptualized the program before it as one closely akin to random periodic testing -- the essential difference being only that the unpredictable triggering event is an accident in one case and selection of one's number by a computer in the other. Yet another indication is the Court's citation with approval of Caruso v. Ward -- a case specifically upholding random drug-testing. Id. at 1394.

Not only does the decision of the State Court of Appeals jibe with the approach taken by this Court, but it also comports with the

decisions in this area of law of the Federal Circuit Courts of Appeals -- including the First, Third, Fourth, Fifth, Seventh, Eighth, Ninth, and D.C. Circuits. Indeed, in a host of cases (many of which involved far less compelling circumstances than the instant case with regard to such matters as governmental interests served, diminution of privacy expectations, job-related drug exposure, and evidence of a drug problem), Circuit Courts have upheld random testing programs for governmental employees in high-risk or high-hazard positions. Several of these cases have specifically upheld the random testing of correction officers. See, e.g., National Federation of Federal Employees v. Cheney, 884 F2d 603, 606n.4, 611-13 (D.C. Cir., 1989), cert. denied, 110 SCt 864 (1990) (various civilian employees of Department of the Army, including correction officers); Taylor v. O'Grady, 888 F2d 1189 (7th Cir., 1989) (correction officers having access to

firearms, opportunity to smuggle drugs into prisons, or contact with prisoners); McDonell v. Hunter, 809 F2d 1302 (8th Cir., 1987) (correction officers having contact with prisons; no evidence of drug problem). Among other categories of employees as to whom random testing has been upheld are those in various law enforcement occupations, including police officers,[3] guards,[4] and

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[3] Guiney v. Roache, 873 F2d 1557 (1st Cir.), cert. denied, 110 SCt 404 (1989) (police officers carrying firearms or engaging in drug interdiction; no evidence of drug problem); Policemen's Benevolent Ass'n v. Township of Washington, 850 F2d 133 (3d Cir., 1988), cert. denied, 109 SCt 1637 (1989) (police officers; no evidence of drug problem); Transport Workers Union v. SEPTA, 884 F2d 709 (3d Cir., 1989) (transit police officers); Weicks v. New Orleans Police Dept., 868 F2d 1269 (5th Cir., 1989) (certain police units; no evidence of drug problem).

[4] National Federation of Federal Employees v. Cheney, 884 F2d 603 (D.C. Cir., 1989), cert. denied, 110 SCt 864 (1990) (civilian Army guards).

criminal investigators.[5] Randon testing has likewise been upheld as to various employees in transportation-related occupations, including air traffic controllers,[6] pilots,[7] transit system operators,[8] and specialized motor vehicle operators.[9] Random testing has also been approved for miscellaneous employees in high-risk fields, even in the absence of drug exposure -- occupations

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[5] AFGE v. Skinner, 885 F2d 884 (D.C. Cir., 1989), cert. denied, 110 SCt 1960 (1990) (criminal investigators in transportation industry).

[6] National Federation of Federal Employees v. Cheney, supra; Bluestein v. Department of Transp., 908 F2d 451 (9th Cir., 1990) (private commercial aviation employees regulated by government).

[7] National Federation of Federal Employees v. Cheney, supra; Bluestein v. Department of Transp., supra.

[8] Transport Workers Union v. SEPTA, supra.

[9] AFGE v. Skinner, supra.

including nuclear power workers,[10] mechanics[11], and hazardous material biochemists and pipefitters.[12]

In short, there can be no claim here that certiorari is necessary because of a conflict between the instant decision and either all or even some of the decisions of the Circuit Courts as to similar issues. To the contrary, the various decisions appear to be in total agreement as to the proper outcome here.

This absence of conflict no doubt heavily accounts for the fact that, in the aftermath of Von Raab and Skinner, this Court has consistently denied certiorari on at least five

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10 Rushton v. Nebraska Pub. Power Dist., 844 F2d 562 (8th Cir., 1988).

11 AFGE v. Skinner, supra; National Federation of Federal Employees v. Cheney, supra.

12 Thomson v. Marsh, 884 F2d 113 (4th Cir., 1989).

none of these cases were the arguments supporting random testing as compelling as in the instant case with regard to such pertinent factors as the employees' acceptance of intrusions upon privacy, the employees' acceptance of prior suspicionless drug-testing programs, evidence of substantial drug usage by the employees, and evidence of the proven insufficiency of lesser remedial measures. If, notwithstanding these considerations, these cases were judged not to warrant legal exposition by this Court, there is no greater reason for the granting of certiorari herein. Indeed, we submit that explication by this Court concerning Federal constitutional law governing random drug-testing should best await a fact pattern in which the competing contentions are quite closely balanced, thereby giving the Court an opportunity to delineate the line beyond which random drug testers may not tread. This is not such a case.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

August 29, 1990.

Respectfully submitted,

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